

The Functions of the Court and the Jury

Members of the jury, you have seen and heard all of the evidence and the arguments of the attorneys. Now I will instruct you on the law that applies to this case.

You have two duties as a jury. Your first duty is to decide the facts from the evidence in this case. This is your job, and yours alone.

Your second duty is to apply the law that I give you to the facts. You must follow these instructions, even if you disagree with them. Each of the instructions is important, and you must follow all of them.

You must perform your duties fairly and impartially. In deciding your verdict, you must not allow sympathy, bias, prejudice, fear, or public opinion to influence you. You should not be influenced by any person's race, color, religion, national ancestry, or sex.

Nothing I say now, and nothing I said or did during the trial, is meant to indicate any opinion on my part about what the facts are or about what your verdict should be.

Parties are Entitled to Equal Consideration

You should consider and decide this case as an action between persons of equal standing in the community, and holding the same or similar stations in life. Each party is entitled to the same fair consideration. All persons stand equal before the law and are to be dealt with as equals in a court of justice.

The Evidence

In determining the facts of this case, you must consider only the evidence that I have admitted in the case. The evidence consists of the testimony of the witnesses and the exhibits admitted in evidence.

What Is Not Evidence

Certain things are not evidence. I will list them for you.

First, testimony and exhibits that I struck from the record, or that I told you to disregard, are not evidence and must not be considered.

Second, anything that you may have seen or heard outside the courtroom is not evidence and must be entirely disregarded. This includes any press, radio, or television reports that you may have seen or heard.

Third, questions and objections by the lawyers are not evidence. Attorneys have a duty to object when they believe a question is improper. You should not be influenced by any objection or by my ruling on it.

Fourth, the lawyers' statements and arguments to you are not evidence. The purposes of these statements and arguments is to discuss the issues and the evidence. If the evidence as you remember it is different from what the lawyers said, your memory is what counts.

Definition of “Direct” and “Circumstantial” Evidence

Some of you may have heard the phrases “direct” and “circumstantial evidence.” Direct evidence is direct proof of a fact, such as testimony by a witness about what that witness personally saw or heard or did. Circumstantial evidence is indirect evidence. In other words, it is proof of one or more facts that point to the existence or non-existence of another fact. The law makes no distinction between the weight to be given either direct or circumstantial evidence. You should decide how much weight to give to any evidence. All the evidence in the case, including the circumstantial evidence, should be considered by you in reaching your verdict.

Common Sense - Inferences

You should use common sense in considering the evidence, and you should consider the evidence in light of your own observations in life.

In our lives, we often look at one fact and conclude from that fact that another fact exists. In law we call this an “inference.” You are allowed to make reasonable inferences. Any inferences that you make must be reasonable and must be based on the evidence in the case.

Weight of the Evidence

You are to decide whether the testimony of each of the witnesses is truthful and accurate, in part, in whole, or not at all, as well as what weight, if any, you give to the testimony of each witness.

In evaluating the testimony of any witness, you may consider, among other things: the witness's intelligence; the ability and opportunity the witness had to see, hear, or know the things that the witness testified about, the witness's memory; any interest, bias or prejudice the witness may have; the manner of the witness while testifying; and the reasonableness of the witness's testimony in light of all the evidence in the case.

Weight of Testimony

You may find the testimony of one witness or a few witnesses more persuasive than the testimony of a larger number. You need not accept the testimony of the larger number of witnesses.

Impeachment of Witness

A witness may be discredited or “impeached” by contradictory evidence, by, among other things, a showing that he or she testified falsely concerning a material matter, or by evidence that at some other time the witness has said or done something that is inconsistent with the witness’s testimony.

If you believe that any witness has been impeached, then you must determine whether to believe the witness’s testimony in whole, in part, or not at all, and how much weight to give to that testimony.

Attorney Interviewing Witness

It is proper for an attorney to interview any witness for the purpose of learning what testimony the witness will give.

“Expert” Witness

You have heard witnesses give opinions about matters requiring special knowledge or skill.

You should judge this testimony in the same way that you judge the testimony of any other witness.

The fact that such a person has given an opinion does not mean that you are required to accept it.

Give the testimony whatever weight you think it deserves, considering the reasons given for the opinion, the witness’s qualifications, and all of the other evidence in the case.

Burden of Proof

In a civil lawsuit like this one, the burden is on the plaintiff to prove every essential element of his or her claim by a “preponderance of the evidence.”

A preponderance of the evidence simply means evidence that persuades you that the plaintiff’s claim is more likely true than not true.

In deciding whether any fact has been proven by a preponderance of the evidence, you may, unless otherwise instructed, consider the testimony of all the witnesses, regardless of who may have called them, and all the exhibits received in evidence, regardless of who may have produced them.

If the proof establishes each essential element of the plaintiff’s claim by a preponderance of the evidence, then you should find for the plaintiff as to that claim.

If the proof fails to establish any essential element of the plaintiff’s claim by a preponderance of the evidence, then you should find for the defendant as to that claim.

Real Parties in Interest

The Plaintiff, PATRICIA PETERSEN, brings this action in a representative capacity by reason of her being Special Administrator of the Estate of JAMES PETERSEN, deceased. She represents herself, PATRICIA PETERSEN, and her children, BERNARD PETERSEN, MATTHEW PETERSEN and COLLEEN PETERSEN. They are the real parties in interest in this lawsuit, and in that sense are the real Plaintiffs whose damages you are to determine if you decide for the Special Administrator of the Estate of JAMES PETERSEN.

Throughout these jury instructions, PATRICIA PETERSEN, BERNARD PETERSEN, MATTHEW PETERSEN and COLLEEN PETERSEN are collectively referred to as the “Estate.”

Negligence

The Plaintiff claims that Plaintiff's decedent, JAMES PETERSEN, came to his death, and that the Defendant was negligent in one or more of the following respects:

- (a) Failed to identify JAMES PETERSEN as being at risk for the development of Deep Vein Thrombosis and Pulmonary Embolism;
- (b) Failed to properly communicate with James Petersen's family physician prior to the September 9, 1999 knee surgery;
- (c) Failed to consult with a hematologist prior to the September 9, 1999 knee surgery;
- (d) Failed to prescribe anticoagulant medication for James Petersen's use subsequent to the September 9, 1999 knee surgery; and
- (e) Failed to disclose the specific risks of said knee surgery, which included the possibility of the development of Deep Vein Thrombosis and Pulmonary Embolism, to JAMES PETERSEN prior to said left knee surgery.

The Plaintiff further claims that one or more of the foregoing was a proximate cause of Plaintiff decedent's death.

The Defendant denies that he was negligent in doing any of the things claimed by the Plaintiff and denies that any claimed act or omission on the part of the Defendant was a proximate cause of the decedent's death.

Elements of Negligence

The plaintiff has the burden of proving each of the following propositions:

First, that the Defendant acted or failed to act in one of the ways claimed by the plaintiff as stated to you in these instructions and that in so acting, or failing to act, the Defendant was negligent;

Second, that the Plaintiff's decedent died;

Third, that the negligence of the Defendant was a proximate cause of plaintiff's decedent's death.

If you find from your consideration of all the evidence that each of these propositions has been proved, then your verdict should be for the plaintiff. On the other hand, if you find from your consideration of all the evidence that any of these propositions has not been proved, then your verdict should be for the Defendant. If you decide for the Defendant on the question of liability, you will have no occasion to consider the question of damages.

Proximate Cause

When I use the expression "proximate cause," I mean a cause which, in natural or probable sequence, produced the death complained of. It need not be the only cause, nor the last or nearest cause. It is sufficient if it concurs with some other cause acting at the same time, which in combination with it, causes the death.

Standard of Care

An orthopedic surgeon who holds himself out as a specialist and provides service in his specialty must possess and apply the knowledge and use the skill and care ordinarily used by a reasonably well-qualified specialist under circumstances similar to those shown by the evidence. A failure to do so is professional negligence.

The only way in which you may decide whether the Defendant possessed and applied the knowledge and used the skill and care which the law required of him is from expert testimony or evidence of professional standards or conduct presented in the trial. You must not attempt to determine this question from any personal knowledge you have.

Informed Consent

In providing medical services to JAMES PETERSEN, an orthopedic surgeon must have obtained JAMES PETERSEN's informed consent.

When I use the expression "informed consent" I mean a consent obtained from a patient by an orthopedic surgeon after the disclosure by the orthopedic surgeon of those risks and/or alternatives to the proposed treatment which a reasonably well-qualified orthopedic surgeon would disclose under the same or similar circumstances. A failure to obtain informed consent is professional negligence.

The only way in which you may decide what risks and/or alternatives the orthopedic surgeon should have disclosed to JAMES PETERSEN is from expert testimony presented in the trial. You must not attempt to determine this from any personal knowledge you have.

Informed Consent – Elements

As part of the Plaintiff's Complaint, the Plaintiff claims that the Defendant failed to inform the Plaintiff's decedent of the risks and/or alternatives to which a reasonably well-qualified orthopedic surgeon would have disclosed under the same or similar circumstances.

The Plaintiff has the burden of proving each of the following propositions as to informed consent:

First, that the Defendant failed to inform the Plaintiff's decedent of the risks and/or alternatives to the arthroscopy surgery which a reasonably well-qualified orthopedic surgeon would have disclosed under the same or similar circumstances;

Second, that if the Defendant had disclosed those risks and/or alternatives, a reasonable person in the Plaintiff decedent's position would not have submitted to the arthroscopy surgery, as performed;

Third, that the Plaintiff's decedent came to his death; and

Fourth, that the Defendant's failure to disclose those risks and/or alternatives was a proximate cause of the Plaintiff's decedent's death.

If you find from your consideration of all the evidence that all of these propositions have been proved, then your verdict should be for the Plaintiff. On the other hand, if you find from your consideration of all the evidence that any of these propositions has not been proved, then your verdict should be for the Defendant as to this issue. If you decide for the Defendant on the question of liability, you will have no occasion to consider the question of damages.

Damages

If you decide for the Plaintiff on the question of liability, you must then fix the amount of money which will reasonably and fairly compensate the Estate of the decedent for the pecuniary loss proved by the evidence to have resulted to the Estate from the death of the decedent.

"Pecuniary loss" may include loss of benefits, goods, services, society and sexual relations.

Where a decedent leaves an Estate, the law recognizes a presumption that the Estate has sustained some substantial pecuniary loss by reason of the death. The weight to be given this presumption is for you to decide from the evidence in this case.

In determining pecuniary loss, you may consider what the evidence shows concerning the following:

1. What instruction, moral training, and superintendence of education the decedent might reasonably have been expected to give his children had he lived;
2. His age;
3. His sex;
4. His health;
5. His habits of industry, sobriety, and thrift;
6. His occupational abilities;
7. The marital relationship that existed between decedent's widow, PATRICIA PETERSEN, and decedent JAMES PETERSEN; and
8. The relationship between the members of the Estate and decedent JAMES PETERSEN.

Pain and Suffering

If you decide for the Plaintiff on the question of liability, you must then fix the amount of money which will reasonably and fairly compensate the Estate for the decedent's conscious pain and suffering experienced prior to death, taking into consideration the nature, extent, and duration of the decedent's conscious pain and suffering.

Whether this element of damages has been proved by the evidence is for you to determine.

Definition

When I use the term "society" in these instructions, I mean the mutual benefits that each family member receives from the other's continued existence, including love, affection, care, attention, companionship, comfort, guidance, and protection.

Damages

If you find for the Plaintiff, then in assessing damages you may consider how long the members of the Estate will be likely to sustain pecuniary losses as a result of JAMES PETERSEN's death, considering how long JAMES PETERSEN was likely to have lived and how long the members of the Estate are likely to live.

According to a table of mortality in evidence, the life expectancy of a male person aged 53 years is 25 years. This figure is not conclusive. This is the average life expectancy of a person who has reached this age. This may be considered by you in connection with other evidence, including evidence of the decedent's occupation, health, habits and activities, bearing in mind that some persons live longer and some persons live less than the average.

Selection of Foreperson - Verdict

Upon retiring to the jury room, select one of your number as your foreperson. The foreperson will preside over your deliberations and will be your representative here in Court.

Forms of verdict have been prepared for you.

[Read the forms of verdict.]

Take these forms to the jury room, and when you have reached unanimous agreement on the verdict, your foreperson will fill in and date the appropriate form, and each of you will sign it.

Communication with Court

I do not anticipate that you will need to communicate with me. If you do, however, the only proper way is in writing, signed by the foreperson, or if he or she is unwilling to do so, by some other juror, and given to the court security officer.

If any communication is made, it should not indicate your numerical division.